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No. 531

In the Supreme Court of the United States

OCTOBER TERM, 1943

ELMER HASTIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 175–183) is reported at 138 F. (2d) 169. The memorandum opinion of the trial judge denying petitioner's motion for a new trial appears in the record at pages 147–154.

JURISDICTION

The judgment of the circuit court of appeals was entered October 14, 1943 (R. 184), and a petition for rehearing (R. 185–201) was denied November 10, 1943 (R. 203). The petition for a writ of certiorari was filed December 10, 1943. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to warrant the jury in finding that petitioner in publishing and distributing the allegedly seditious pamphlets, wilfully attempted to cause insubordination, disloyalty, mutiny, or refusal of duty in the armed forces.

2. Whether it was proper for the trial judge to instruct the jury that in determining petitioner's intent they were at liberty to presume that he intended the natural and probable result of the language used.

STATUTE INVOLVED

Section 3 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, 41 Stat. 1359 (50 U. S. C. 33), provides in pertinent part as follows:

> Whoever, when the United States is at war, * * * shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

STATEMENT

Petitioner and two others were charged in a seven-count indictment (R. 2–15) returned in the United States District Court for the Northern District of Illinois with violations of Sections 3 and 4 of the Espionage Act of 1917 (50 U. S. C. 33, 34) by publishing and disseminating, in time of war, three pamphlets—one entitled "The British, an Inferior Breed," another "The Jew Makes a Sacrifice," and the third designated in the proof as "The Diseased Spinal Cord" (R. 73) but untitled in the indictment. Counts 1, 3 and 5 charged that by these actions the defendants unlawfully, wilfully and knowingly obstructed the recruiting and enlistment service of the United States; counts 2, 4 and 6 charged that they unlawfully, knowingly, and wilfully caused and attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States; and count 7 charged a conspiracy to violate Section 3, in violation of Section 4 of the Espionage Act (R. 2–15).

Petitioner was found guilty on all counts (R. 146, 154) and was sentenced generally to imprisonment for five years (R. 154). On appeal his conviction was affirmed (R. 184).[1]

[1] Petitioner's co-defendants, Mccartney, an attorney, and Soller, the mimeographer of the pamphlets, were found guilty on counts 5, 6 and 7 (R. 156), but their convictions were set aside—Mccartney's by the trial judge on motion for a new trial (R. 154), and Soller's by the circuit court of appeals on the ground that there was no proof that he knew

The essential facts are undisputed. In 1942 petitioner wrote the three articles charged in the indictment, had them mimeographed by his co-defendant Soller, and sent out about six hundred copies to persons on his mailing list (R. 79, 127–128). In order to avoid detection, he deposited the envelopes in several different mail boxes and endeavored to leave no fingerprints (R. 131–132). He stated that he compiled his mailing list from various sources—lists of persons prominent in the America First Committee; commanders of the American Legion; organizations which he considered patriotic, such as the Daughters of the American Revolution and We the Mothers Mobilize; fraternities, sororities, and labor unions (R. 79, 127–128). The Government proved that one or more of the pamphlets were mailed to the United States Infantry Association (R. 18–19), the Commanding General of the United States Army Air Forces (R. 19), Colonel Hastings of the General Staff (R. 19), the President of Northwestern University (R. 20), the American Newspaper Publishers Association (R. 20), the Lions International (R. 21), the Kiwanis International (R. 21–

what use petitioner made of the pamphlets (R. 182–183). Since these two defendants were the only co-conspirators of petitioner named in the indictment, the setting aside of their convictions makes it impossible, of course, to sustain petitioner's conviction upon the basis of the conspiracy count. However, petitioner was found guilty on all of the other counts of the indictment and the sentence rendered was one permissible under any of those counts.

22), the Air Line Pilots Association (R. 22), and the American Legion (R. 22).

The pamphlets are set out in full in the record (R. 70–75). They depict the war as a betrayal of the United States to the "British Jewish yellow race" by the President (R. 70). The British are characterized as an "inferior breed" and a "degenerate empire" (R. 70); the Jew as an "oriental hyphenated American, propagandist for bloody Joe and the British (Jewish) empire," waiting until "many of the young men of America are killed—when the sick, the exhausted, the cunning remain—then he will, as in Russia, crawl from his nest" (R. 71–73); the personal references to the President appear at pages 74–75 of the Record. The concluding portion of one of the pamphlets (*ibid.*) advocates starvation of our allies, our internal dissolution, and "occupation by foreign troops until we are able to stand alone."

In his instructions to the jury the trial judge quoted from the opinion of this Court in *Schenck* v. *United States*, 249 U. S. 47, 52, as follows:

> The question in each case is whether the words used are used in such circumstances or [are] of such a nature as to create clear and present danger that they will bring about the effect [the substantive evils] that Congress has the right to prevent [R. 137].[2]

[2] The precise language of the *Schenck* opinion is contained in brackets.

In respect of the intent which the jury was required to find before they could convict, the judge instructed the jury:

> It is charged in the indictment they [the pamphlets] were intended to produce those results. In determining whether they were used with that intent, you will take into consideration all of the circumstances in the case, and you must take into consideration the words used, and whether from the words used themselves you could find that there was such intent, and you are at liberty to infer that, to take into consideration the language used, the intention and the probable result of such language used, you are at liberty to infer that from all of the facts and circumstances that you have heard testified to here in the evidence, the circumstances under which they were issued. [R. 138.]

In response to a request by petitioner's counsel for a more detailed instruction on the specific intent required under the statute (R. 141, 143, 144–145), the judge charged:

> It is necessary for the government to prove that the defendants intended to interfere with the enlistment and recruiting services and intended to cause insubordination. I thought I covered that, but if I did not, that is a necessary element of an offense, and in determining whether there was such an intent you must consider all

> the evidence in the case, the nature of the language used, the circumstances under which it was used, and you are at liberty to presume that the defendants intended the natural and probable result of the language used. [R. 145.]

ARGUMENT

The circuit court of appeals based its affirmance of the judgment on those portions of counts 2, 4, and 6 which charged attempts to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States (R. 179–180, 182). Although we think it is clear that the judgment may also be affirmed on the counts charging obstruction of the recruiting and enlistment services of the United States, the questions raised by the petition for certiorari need be considered only as they relate to the counts affirmed by the court below.[1]

1. Petitioner contends (Pet. 18, 25, 26–31) that the evidence was insufficient to support the jury's finding that he intended to cause insubordination, disloyalty, mutiny or refusal of duty in the military

[1] Since the general sentence imposed was less than the maximum which could have been imposed on any one count, the judgment will be sustained if the evidence supports the conviction on any count. *Hirabayashi* v. *United States*, 320 U. S. 81, 105; *Whitfield* v. *Ohio*, 297 U. S. 431, 438; *Brooks* v. *United States*, 267 U. S. 432, 441; *Pierce* v. *United States*, 252 U. S. 239, 252–253; *Abrams* v. *United States*, 250 U. S. 616, 619.

or naval forces of the United States.[4] He predicates his argument on the assertions that the pamphlets do not on their face counsel disloyalty or insubordination and that the Government failed to prove circulation among the armed forces. The pamphlets, however, had one obvious purpose, apparent on their face—to persuade the readers that the present war was a gross betrayal of the United States by the President for the benefit of the British and the Jews. Indeed, petitioner himself admitted on cross-examination that he thought "the troops" ought to know the consequences of the war, that they ought to consider whether America was betrayed, and that he was opposed to the Americans and British invading Europe (R. 132). In addition, the proof established that the first two articles were sent to the Commanding General of the Air Forces and to Colonel Hastings of the General Staff; and that all three articles were sent to the United States Infantry Journal whose personnel included army officers of high rank (R. 18–19). Unquestionably, if petitioner had succeeded in inculcating his point of view among persons of such authority, if he had been able to convince them that their commander in chief was as represented, that the war was the "beginning of insanity," he would have caused insubordination and disloyalty in the military forces. That our high ranking officers proved

[4] As shown in the Statement, *supra*, pp. 6–8, the trial judge expressly instructed the jury that, before they could convict, they must find that petitioner distributed the pamphlets with

immune to such propaganda does not of course exonerate petitioner from liability under the statute for his attempt so to influence them.[5]

2. Petitioner complains (Pet. 32–37) of that portion of the instructions in which the trial judge told the jury that, in determining petitioner's intent, they were "at liberty to presume that defendants intended the natural and probable result of the language used" (R. 145). This instruction is supported by the decisions of this Court in sedition cases[6] and by decisions under other statutes requiring proof of a specific criminal intent.[7] The validity of such a presumption has been disputed when applied to situations where the allegedly seditious utterances were primarily designed to further some objective other than obstruction of the war effort and where such obstruction was merely an incidental and perhaps

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intent to interfere with the recruiting and enlistment service and to cause insubordination. It is, therefore, clear that the jury found that petitioner had the specific intent to commit the crimes charged.

[5] Since, as we have shown, the evidence was sufficient to take the attempt counts to the jury, no issue of infringement of freedom of speech is involved and petitioner's argument (Pet. 26–31) to the contrary is untenable.

[6] *Pierce* v. *United States*, 252 U. S. 239, 249; *Abrams* v. *United States*, 250 U. S. 616, 621; *Debs* v. *United States*, 249 U. S. 211, 214–215. See also *Kirchner* v. *United States*, 255 Fed. 301, 305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.

[7] *United States* v. *Patten*, 226 U. S. 525, 543; *Agnew* v. *United States*, 165 U. S. 36, 53; *Allen* v. *United States*, 164 U. S. 492, 496; *Reynolds* v. *United States*, 98 U. S. 145, 167; *United States* v. *Anderson*, 101 F. (2d) 325, 330 (C. C. A. 7), certiorari denied, 307 U. S. 625.

an undesired consequence.[8] In the instant case the instruction merely had the effect of authorizing the jury to find that pamphlets circulated among high army officers which on their face disclose an intent to cause disaffection with the war and contempt for the commander in chief were distributed with intent to cause disloyalty in the armed forces. Such an inference as to petitioner's intent is inevitable from the circumstances in this case, without the aid of the presumption to which the district court adverted.[9]

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[8] See dissenting opinion of Justice Holmes in *Abrams* v. *United States*, *supra*, pp. 628–629.

[9] Petitioner raises (Pet. 10–12) but does not argue the contention that the trial court erred in admitting in evidence pamphlets written and distributed by petitioner prior to the war. The judge specifically instructed the jury that these pamphlets were to be considered only on the question of petitioner's intent (R. 138). The admissibility of such evidence when limited to this purpose is well established. *Williamson* v. *United States*, 207 U. S. 425, 451; *Allis* v. *United States*, 155 U. S. 117, 119; *Wood* v. *United States*, 16 Pet. 342, 360–361; *Viereck* v. *United States*, 130 F. (2d) 945, 959–960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley*, 132 F. (2) 170, 180–181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States*, 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Hovenstine* v. *United States*, 263 Fed. 1, 5–6 (C. C. A. 9); *Stenzel* v. *United States*, 261 Fed. 161, 162 (C. C. A. 8); *Shidler* v. *United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman* v. *United States*, 257 Fed. 601, 603–604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States*, 256 Fed. 805, 811–812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States*, 255 Fed. 301, 304–305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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